LARRY W. DIRKS, SR.
NICHOLAS W. DIRKS
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IBLA 73-128, 403; IBLA 74-67 Decided February 22, 1974

Appeal from Bureau of Land Management decision rejecting Native allotment applications AA 8040, 8055, 8044.

Affirmed.

Alaska: Native Allotments

The Alaska Native Allotment Act authorizes a qualified person to select land. The right is nonalienable, nontransferrable, and noninheritable, and it terminates with death. But where an allotment selection has been made and the applicant fully complies with the law and regulation and accomplishes all that is required to be done, the right to allotment is earned and becomes a property right which is inheritable.

An Alaska Native allotment may be made only upon vacant, unappropriated and unreserved public domain land. But an allotment for withdrawn land may be approved where occupancy and use was initiated and the law was fully complied with prior to withdrawal.

An allotment right is personal to one who has fully complied with the law and regulations. A native who applies for withdrawn lands must show that he did comply with the law prior to the effective date of withdrawal, and he may not tack on his deceased parent's use and occupancy to establish a right for himself prior to the withdrawal.

APPEARANCES: John Anthony Smith, Esq., of Kay, Miller, Libbey, Kelly, Christie and Suld, for appellants; Loretta C. Douglas, Esq., Office of the Solicitor, for the Government.

OPINION BY MR. FRISHBERG

The several Native allotment applications involved in this decision were rejected by the Alaska State Office because occupation and use of appellants commenced after the withdrawal of the land by Executive Order 1733 of March 3, 1913. On appeal each appellant stated that commencement of occupancy was given in the original application as subsequent to the date of withdrawal because of a lack of understanding that he could claim the residency of his father and forebears which, when tacked on to his own residence, would establish a right prior to 1913. In view of the similarity of issues, the appeals have been joined.

In each case appellants commenced occupation and use within the past 20 years. Appellants have not been disturbed in their occupation of the lands which were withdrawn in 1913 as a National Wildlife Refuge. The lands remain on withdrawn status and have not been restored to entry. For the purposes of this decision we will assume that each appellant occupied and used the land continuously since 1960 and that he can establish that his father or other forebear used and occupied the land continuously from a period prior to 1913. The question immediately before us is whether an applicant for native allotment may tack on to his own period of occupation and use the prior period of occupation and use by his parents in order to qualify for an allotment. We answer this in the negative.

An applicant for native allotment must be qualified under the statute in his own right. An allotment applicant may not tack on the residency of his forebears to the use and occupancy which he may claim as his own.

The Allotment Act, 43 U.S.C. § 270-1 (1970), provides, in material part, as follows:

> The Secretary of the Interior is authorized and empowered, at his discretion and under such rules as he may prescribe, to allot not to exceed 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska * * * to any Indian, Aleut, or Eskimo of full or mixed blood who resides in and is a native of Alaska, and who is the head of a family, or is 21 years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity * * * *

Further provision is made that only a person who has made substantially continuous use and occupancy of the land for a period of five years may qualify for allotment. 43 U.S.C. § 270-3 (1970).

This statute is clearly in the present tense. It authorizes allotment to one who resides in and is a native of Alaska. "No allotment shall be made to any person * * * until said person has made proof satisfactory * * * of substantially continuous use and occupancy of the land for a period of five years." This, too, limits a grant of allotment to a living person who himself can show that he has substantially used and now occupies the land. This interpretation is consistent with the Congressional mandate of the General Allotment Act of 1887, 25 U.S.C. § 331 et seq. (1970).

In Woodbury v. United States, 170 Fed. 302 (8th Cir., 1909), certain lands were to be allotted in severalty to qualified Chippewa Indians after surveys, preparation of role, etc., under the Act of April 28, 1904, 33 Stat. 539. On August 20, 1904, Joseph Woodbury presented his allotment selection; because of incomplete governmental preliminary preparations, he was informed that his filing was premature. Nevertheless, he was invited to leave his application, which was retained by the Agent. Woodbury died on September 2, 1904. The government completed its preliminary allotment preparations in April 1905. In considering whether his widow could inherit the allotment for which Woodbury had applied during his life, the Court said:

> * * * the allotment was made, Woodbury's right was personal--a mere float--giving him no right to any specific property. This right, from its nature, would not descend to his heirs. They, as members of the tribe, were severally entitled to their allotments in their own right. To grant them the right of their ancestor, in addition to their personal right, would give them an unfair share of the tribal lands. The motive underlying such statutes forbids such a construction. As the learned United States attorney says, in his able brief:
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> > It is well to remember that these Indian laws were not enacted merely to create property rights for the enrichment of Indian families. They were designed to operate on the individual Indian in his lifetime, to the end that they might mold and shape his life and habits somewhat after the manner and ways of civilization.

> The instructions for making the allotments approved by the President required that "the Indian must be in being at the time the allotment is made or assigned to him; in other words, no allotment can be made to a dead Indian." Woodbury's failure to secure his allotment in his lifetime was not the fault of anybody. * * * *
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> (170 Fed. at 305-6)

In LaRoque v. United States, 239 U.S. 62, 66 (1915), the Supreme Court, after quoting from the General Allotment Act of 1887, said:

> We think the terms of the general act contemplated only selections on the part of living Indians, acting for themselves or through designated representatives. The express provision for selections in behalf of children and of Indians failing to select for themselves, under the absence of any provisions in respect of Indians dying without selections, are persuasive that no selections in the right of the latter were to be made. In other words, as to them there was no displacement of the usual rule that the incidence of tribal membership, like the membership itself, are terminated by death. [Citations omitted]

In United States v. Arenas, 158 F.2d (9th Cir., 1947), the Court cited LaRoque with favor. It held that an Indian must be alive to claim an allotment when the right to allotment accrued; no equitable rights could vest in the estate of a deceased and there could be no inheritance of allotment rights through the estate of a deceased. Corollary thereto the Court held that where an Indian had made his allotment selection, had done all that he was required to do, and there was nothing remaining but the physical delivery of an allotment certificate, the applicant had acquired an equitable right. The equitable right is inheritable and an allotment certificate in Arenas was directed to be issued to the surviving spouse.

Woodbury, LaRoque and Arenas support the conclusion that where an Alaskan Native had failed to exercise allotment rights during his lifetime the right of selection died with him. No inheritable right survived his demise and his next of kin gained no right to the unexercised float selection right. It follows that when an allotment applicant has not qualified under the Act, he cannot tack on the expired noninheritable rights of his ancestors.

None of the appellants before us assert that they personally commenced occupation and use under the Allotment Act prior to 1960; rather they assert rights were initiated by them almost 47 years after the lands were withdrawn. Since no entitlement under the Allotment Act accrued to their ancestors, they may not avail themselves of unused rights which expired with the demise of those ancestors. The Bureau of Land Management properly rejected the allotment applications because no rights can accrue to a settler stemming from occupancy of withdrawn land segregated from the operation of the public land laws. Terza Hopson, 3 IBLA 134 (1971); United States v. Minnesota, 270 U.S. 181 (1926).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

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Newton Frishberg, Chairman

We concur:

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Martin Ritvo, Member

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Douglas E. Henriques, Member